BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES WEBB	)	
Claimant	)	
	)	
VS.	)	
	)	
HI-LO INDUSTRIES	)	
Respondent	)	Docket No. **247,536**
	)	
AND	)	
	)	
FIREMAN'S FUND INSURANCE CO.	)	
LUMBERMEN'S CASUALTY INS. CO.	)	
Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Claimant requests review of the January 2, 2014 Post-Award Medical Award by Administrative Law Judge Bruce Moore. The claim has been placed on the summary docket for disposition without oral argument. Patrick Smith of Pittsburg, Kansas, appeared for claimant. David Brake of Chanute, Kansas, appeared for respondent and Fireman's Fund Insurance Co. (Fireman's Fund). Scott Gordon of Overland Park, Kansas, appeared for respondent and Lumbermen's Casualty Insurance Co. (Lumbermen's Casualty).

The record on appeal is the same as that considered by the ALJ[1] and consists of the post-award evidentiary deposition of claimant, dated August 2, 2013; the deposition of Edward Prostic, M.D., with exhibits, dated September 30, 2013; the deposition of Patrick Hughes, M.D., with exhibits, dated September 30, 2013; the deposition of Robert Barnett, PhD., with exhibits, dated July 30, 2013; and all pleadings contained in the administrative file.

The ALJ found:

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[1] The Post-Award Medical Award did not specifically include as part of the record the settlement hearing transcript dated December 3, 2002. However, it appears the ALJ considered the transcript. The Board finds the transcript is part of the record and it was accordingly reviewed by the Board.

> Given the weaknesses in the approaches taken by Drs. Prostic and Barnett, the court finds and concludes that Dr. Hughes' opinions and conclusions are more reliable. **Claimant has failed to sustain his burden of proof that he has developed depression or anxiety as a result of his work injury or subsequent treatment.** Claimant's request for post-Award medical treatment for depression and anxiety are **CONSIDERED** but **DENIED**.[2] (emphasis in original)

ISSUES

Claimant, who was age 64 when he testified at his August 2, 2013 deposition, sustained personal injury by accident to his neck, right shoulder and right arm on February 17, 1999. The claim was concluded by settlement hearing on December 3, 2002, with the rights of the parties regarding future medical and review and modification left open upon application. The parties, as part of the settlement, agreed that any future medical treatment or disability compensation awarded for claimant's right upper extremity injury would be the responsibility of Fireman's Fund. Lumbermen's Casualty assumed responsibility for any future medical treatment or disability compensation awarded to claimant for the cervical spine injury.

Claimant filed an application for post-award medical on April 3, 2013,[3] seeking psychological counseling. Evidence was introduced on the issue of post-award psychological treatment, following which the ALJ entered the Post-Award Medical Award now before the Board.

Claimant contends the ALJ erred in finding he did not prove he needed mental heath treatment as a result of his physical injury. Claimant maintains he should be awarded "an order authorizing psychotherapy and a medication consultation or at least order a Court appointed IME in light of the differing expert opinions."[4] Claimant also requests post-award attorney fees.

Respondent and Fireman's Fund argue the Post-Award Medical Award should be affirmed or, in the alternative, any liability for treatment, costs and fees should be assessed equally between the two insurance carriers.

Respondent and Lumbermen's Casualty contend claimant failed to prove he needed psychological or psychiatric treatment necessary to cure or relieve the effects of the February 17, 1999 injury.

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[2] P.A.M. Award at 7.

[3] Claimant previously filed applications for post-award medical treatment, but the current application was the first requesting psychological treatment.

[4] Respondent's Brief at 3 (filed Feb. 6, 2014).

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact. To quote the ALJ's post-award decision:

> Claimant suffered personal injury, by accident, arising out of and in the course of his employment on February 17, 1999, while lifting a mattress. He had pain extending from his neck through his shoulder down to the fingers on his right hand. He also alleged a series of injuries attributable to work activities on and after February 17, 1999. He was initially treated for a suspected right biceps rupture, and has also been treated for a right rotator cuff tear, as well as right carpal tunnel and Guyon's canal syndromes. Claimant also received treatment for his neck complaints, although it remains unclear whether his upper extremity complaints reflect cervical radiculopathy or peripheral nerve entrapment. He has also been diagnosed with paralysis of the right long thoracic nerve. He has had "somewhere between eight and nine" surgeries to address his complaints, including a trial implantation of a dorsal column stimulator. He denies any relief as a result of any of his surgeries.[5]
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> Claimant settled his claim, on a running award, on December 3, 2002, with Fireman's Fund Insurance accepting responsibility for the right upper extremity complaints, and Lumbermen's Underwriting Alliance accepting responsibility for complaints of injury to the spine. Rights to future medical and Review and Modification were reserved to Claimant as to both insurance carriers and the complaints for which they accepted responsibility.[6]

Claimant testified he underwent 8 or 9 surgeries since his accidental injury in 1999.[7] No record of claimant's extensive medical treatment was placed into evidence. However, claimant's surgical treatment before Dr. Prostic's 2004 examination included:

1. Exploration of the right biceps tendon at the elbow performed by Dr. Thomas Phillips.

2. Two releases of the median and ulnar nerves at the right wrist performed by Dr. John Moore.

3. Right cubital tunnel release by Dr. Jeffrey MacMillan.

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[5] P.A.M. Award at 2.

[6] *Id.* at 3.

[7] P.A.M. Trans. at 4 (Aug. 2, 2013).

Surgical treatment after 2004 included:

1. Cervical arthrodesis performed by Dr. Harold Hess in 2009.

2. Implantation of a spinal cord stimulator in approximately 2009-2010.

The spinal cord stimulator was intended to relieve claimant's chronic neck, right shoulder and arm pain. Claimant testified the spinal cord stimulator increased his pain and was thereafter deactivated.

Claimant sought treatment with his family physician, Dr. Guernsey, who prescribed pain medication and referred him to a specialist. Respondent refused to authorize treatment so claimant consulted, at his expense, Dr. Gautham Reddy, a neurologist. Dr. Reddy had no further treatment to recommend.

Claimant testified he began experiencing symptoms of depression that worsened following each of his surgeries. He described his status before receiving the spinal cord stimulator:

> A. It was just -- It was hard just to get out of bed. It was hard to do anything. I mean, it was just everything was a struggle. All of my activities outside of work were just completely destroyed. No more opportunity hunting, no more fishing. Or very little hunting, very little fishing. I was really restricted on what I would do. No more softball, no more golf, no more tennis. It just pretty well changed my whole life around.[8]
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> . . .
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> Q. I've looked at the records from at least 15 or so [medical providers], and in those records, I don't see a single psychological complaint made to any of the treating physicians. Did you express any problems over the last 13 years to these physicians?
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> A. It's not something I like to speak of and complain about, so I probably didn't.[9]

Claimant testified his psychological symptoms commenced at some point before the implantation surgery and included sadness, feelings of hopelessness, worry, sleep disturbances, nervousness, tension and restlessness. According to claimant, his symptoms of depression worsened after that surgery. Claimant testified he still experiences the same

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[8] *Id.* at 9.

[9] *Id.* at 13.

symptoms. As of August 2, 2013, claimant was taking care of his own finances; engaging in activities of daily living; performing housekeeping chores; fishing and hunting occasionally; and mowing grass for six or seven individuals, a church and a parsonage. Claimant was not taking any pain medications.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant at his counsel's request on June 22, 2001. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Prostic diagnosed: (1) degenerative disk disease of the cervical spine, (2) traction injury to the long thoracic nerve with serratus anterior palsy, (3) probable partial avulsion of the biceps tendon at the [right] elbow, and (4) median and ulnar nerve entrapment at the [right] wrist. Dr. Prostic rated claimant's aggregate permanent functional impairment at 30% to the whole person.

Dr. Prostic evaluated claimant again on February 4, 2002, and December 3, 2004. The doctor reviewed additional medical records, took updated histories and performed physical examinations. Dr. Prostic opined claimant's functional impairment had increased over this period of time which was the natural and probable progression from his original injury with respondent. Following the February 4, 2002 examination, Dr. Prostic continued to rate claimant's functional impairment to 30% to the body. After the December 3, 2004 exam, Dr. Prostic increased his body as a whole rating to 34%.

Claimant was evaluated by Dr. Prostic for the fourth time on September 19, 2012, at which time Dr. Prostic increased his functional rating to 45% to the body as a whole. Dr. Prostic was suspicious a psychological problem was a barrier to claimant's improvement so he administered a Minnesota Multiphasic Personality Inventory (MMPI), a standardized psychological test. Dr. Prostic testified as follows:

> Q. And what information did you obtain from the MMPI?
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> A. Well, he has what's called a Conversion-V profile; very high scores in scales 1 and 3, less high in scale 2, all three of which are more than two standard deviations from the mean. So this indicates significant psychopathology.
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> Q. Based on your long history with this patient dating back to 2001 and based on what you saw as far as a progression of his functional impairment and now some psychological component, do you have an opinion as to whether or not he would benefit from some treatment -- or whether or not -- let me strike that -- whether or not he should be referred for some treatment/evaluation for his psychological condition?
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> . . .

> A. It's my opinion that he needs to be offered psychotherapy. It has a poor prognosis, but it should be offered.[10]

Based upon the AMA *Guides*,[11] Dr. Prostic found claimant had a 45% whole body functional impairment.[12] The doctor opined that if claimant did not get relief from his emotional difficulties then he is permanently and totally disabled from substantial, gainful employment. Dr. Prostic testified the increase in claimant's functional impairment was due to the natural progression of the injuries he sustained on February 17, 1999. According to Dr. Prostic:

> Q. You had made a comment that although Mr. Webb should be offered psychotherapy that the prognosis wasn't terribly good. Could you comment on that, please?
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> A. Well, the statistics we have on this are really derived from low back pain sufferers, so that a low back pain sufferer who has this profile on MMPI and who has been operated has only a 10 percent probability of returning to gainful employment. Likewise, someone with low back pain who's been out of work for more than two years has only about a 10 percent probability of going back to work with or without a psychologically abnormal profile. So if we can extrapolate the low back statistics to this cervical spine patient, he really has a very poor prognosis for returning to gainful employment.[13]

Dr. Prostic opined claimant may be receiving secondary gain from his symptoms. The doctor testified that patients who have profiles like claimant's and return to work have new injuries immediately afterwards and start back through the workers compensation system again.[14]

Dr. Robert Barnett, a licensed clinical psychologist, interviewed claimant on November 13, 2012, at the request of his counsel. The doctor administered several psychological tests including the MMPI-2. Dr. Barnett found claimant: (1) was not malingering; (2) had no organic brain damage or dysfunction; (3) had an eighth grade reading level; (4) had an elevated symptom inventory on the obsessive/compulsive,

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[10] Prostic Depo. at 13-14.

[11] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[12] This rating includes functional impairment of 20% to the right lower extremity for an unrelated knee injury in 2008.

[13] Prostic Depo. at 16.

[14] *Id.* at 30.

depression and anxiety scales; and (5) showed signs of depression when he was interviewed.

Dr. Barnett's diagnostic impression was late onset dysthymic disorder, moderate, which is usually secondary to some loss or some event that does not spontaneously improve. Claimant's "mood was disturbed by the accident at work and it has not generally improved since then."[15]

Dr. Barnett opined regarding claimant's psychological impairment as follows:

> A. In my clinical opinion he is experiencing symptoms of depression and anxiety, primarily depression, as a result of his injury and the various losses associated with that injury.
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> The AMA rating that I gave was in Class 3 of the Fourth Edition, which is moderate impairment. And I extrapolated this to the Second Edition, Table 1. That would place him also in Class 3, which implies a percentage of impairment of 25 to 50 percent. But within that range I would estimate a percentage of impairment to be 35 percent. Both of these classifications suggest positive rehabilitation potential.
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> Q. What are your treatment recommendations at this time?
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> A. I think Mr. Webb could benefit from psychotherapy focused on better adjustment to his problems as well as his losses. I also think that even though he has tried antidepressant medications in the past with some problems, I think he should give it another try. I think he should see a psychiatrist for a psychiatric medication evaluation. Now, I want to emphasize I think it should be a psychiatrist, not go to his family physician or a nurse practitioner or someone like that.[16]

Dr. Barnett testified the MMPI administered by Dr. Prostic indicated claimant had depression. Scales 1, 2 and 3 (neurotic triad) were all elevated in the first test but only scales 1 and 2 were elevated in the MMPI-2 administered by Dr. Barnett.

Dr. Barnett testified regarding causation as follows: "There are concerns that Mr. Webb is experiencing ongoing psychiatric difficulties directly related to his on the job injury. In my clinical opinion, Mr. Webb's current psychological symptoms are directly associated to his on the job injury and his loss of various aspects of functioning over the years."[17]

Dr. Barnett further testified:

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[15] *Id*. at 10.

[16] *Id*. at 12-13.

[17] *Id.*, Ex. 2 at 8.

> Q. Okay. And again, Doctor, just so that we're clear, you nowhere and in none of the testing link any of the findings from the results of your tests to a February 1999 accident; correct?
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> A. Only by implication.
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> Q. Finally, none of the opinions that you've stated are based to a reasonable degree of medical certainty or probability; correct?
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> A. Well, they're all to a reasonable degree of psychological certainty.[18]

In Dr. Barnett's opinion, claimant's prognosis for improvement from mental health treatment is good, provided claimant earnestly participates in the treatment.

Dr. Patrick Hughes, a board certified clinical psychiatrist, evaluated claimant on July 22, 2013, at the request of counsel for respondent and Lumbermen's Casualty. The doctor reviewed claimant's medical records, the reports of the MMPIs administered by Drs. Prostic and Barnett, and Dr. Barnett's narrative report. Dr. Hughes took a psychiatric history and determined claimant needed no psychiatric treatment. In Dr. Hughes' opinion, claimant had no psychological barriers that would keep him from working. Dr. Hughes testified regarding the MMPI data:

> A. Well, by definition, a conversion disorder or malingering are the two psychiatric states where a person reports physical symptoms but don't have any physical basis or minimal basis physical in reference to how severe they would put their physical symptoms are, and conversion disorders are judged to be unconsciously feigned or exaggerated physical symptoms.
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> Malingering is defined as the conscious purposeful feigning or exaggeration of physical or psychiatric symptoms. But the entire purpose and drive between either conversion symptoms or malingering is to attain and maintain one or more of the secondary gains that come from being judged in any other number of ways to be legally sick or disabled.[19]

Dr. Hughes testified that more than half of the psychological evaluations he has performed revealed no psychological impairment caused by the patients' work-related injuries. According to Dr. Hughes, the vast majority of workplace injuries are orthopedic in nature that cause no mental illness, nor does chronic pain cause mental illness.

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[18] *Id*. at 38-39.

[19] Hughes Depo. at 17.

According to Dr. Hughes, claimant does not have anything wrong with him from a psychiatric or psychological standpoint. He further testified claimant needs no mental health treatment.

Claimant did not advise Drs. Barnett or Hughes that he had been taking antidepressants prescribed by his personal care physician and Dr. Steven Hendler, a physiatrist who treated claimant in 2010 and 2011.

PRINCIPLES OF LAW AND Analysis

K.S.A. 1998 Supp. 44-510(a) provides:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The undersigned Board member agrees with the ALJ that claimant did not sustain his burden to prove he requires psychological or psychiatric treatment necessary to cure and relieve the effects of claimant's February 17, 1999 injuries. The reasons for that conclusion are:

1. The opinions of Dr. Prostic regarding claimant's psychological condition are not persuasive because he is not qualified to testify as an expert in the fields of psychology or psychiatry.

2. Dr. Barnett's opinion that claimant's psychological difficulties are directly related to the February 17, 1999 injury is unpersuasive because claimant made no documented complaints of psychological symptoms for a period of approximately 13 years after his physical injuries. Moreover, claimant neither requested nor received any psychological or psychiatric treatment after the date of his injuries with the possible exception of anti-depressant medication prescribed by Dr. Hendler in 2010 and/or 2011 and at an uncertain time by Dr. Guernsey.

3. It seems improbable any need for psychological treatment was caused by claimant's physical injuries such injuries occurred over a decade before claimant's initial complaints of psychological symptoms.

4. Dr. Barnett's conclusions regarding claimant's diagnosis, need for treatment and causation are contradicted by the testimony of board certified psychiatrist, Dr. Hughes. but Under the circumstances of this claim, Dr. Hughes' opinions, particularly regarding causation, outweigh those expressed by Drs. Barnett and Prostic.

5. Dr. Barnett's opinion that claimant's mood was disturbed by the accident at work and it has not generally improved since then is unsupported by the evidence.

The Board finds claimant does not need psychological or psychiatric treatment reasonably necessary to cure and relieve the effects of his injuries. As supplemented by the discussion above, the Board adopts the findings and conclusions of the ALJ.

The request of claimant's counsel for post-award attorney fees should be submitted to Judge Moore in compliance with the version of K.S.A. 44-536(g) in effect when claimant sustained his accidental injury and according to the ALJ's directions set forth on page 7 of the Post-Award Medical Award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[20] Accordingly, the findings and conclusions set forth above and below reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Post-Award Medical Award of Administrative Law Judge Bruce Moore dated January 2, 2014, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[20] K.S.A. 1998 Supp. 44-555c(k).

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